

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

STEVEN E. HAKE, M.D.,

Plaintiff,

vs.

MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY,

Defendant.

Case No. 2:09-cv-01563-KJD-GWF

**FINDINGS AND
RECOMMENDATION**

**Motion for Order Dismissing
Action (#28)**

This matter is before the Court on Defendant's Motion for Order Dismissing Action For Failure to Comply With Court's Discovery Order (#28), filed on June 23, 2010; Plaintiff's Opposition to Defendant's Motion to Dismiss (#30), filed on July 19, 2010; and Defendant's Reply to Plaintiff's Untimely Opposition to Motion Requesting Dismissal of Action (#32), filed on July 26, 2010. The Court conducted a hearing in this matter on August 4, 2010.

BACKGROUND

Plaintiff Steven E. Hake, M.D. alleges that in or about 2004 he became totally disabled from performing his profession as a radiologist as a result of accidental and unknowing exposure to mold in his home. Plaintiff submitted a claim for benefits under a disability insurance policy issued by Defendant Massachusetts Mutual Life Insurance Company. Plaintiff alleges that Defendant breached the insurance policy by wrongfully determining that Plaintiff was only entitled to lower partial disability benefits. Plaintiff filed his complaint against Defendant on July 1, 2009. Plaintiff's first and second causes of action allege claims for declaratory relief and breach of contract, respectively. The third cause of action alleges a claim for tortious breach of the duty of good faith and fair dealing and the fourth cause of action alleges that Defendant has engaged in unfair claims practices in violation of Nevada Revised Statute (NRS) §686A.310. These latter two causes of action are hereinafter referred to as the "extra-contractual" or "bad faith" claims.

1 The discovery plan and scheduling order was entered on December 16, 2009. *Joint*
2 *Discovery Plan and Scheduling Order* (#21).¹ Pursuant thereto, the parties were required to serve
3 their Rule 26(a) initial disclosures before the end of December 2009. Defendant served its initial
4 disclosures on December 21, 2009. Plaintiff, however, failed to make any initial disclosures. *See*
5 *Defendant's Motion to Compel* (#22), p. 2. On December 17, 2009, Defendant served
6 interrogatories and requests for production of documents on Plaintiff. On January 19, 2010,
7 Defendant granted Plaintiff an extension until January 29, 2010 to respond to the interrogatories
8 and requests for production. *Motion to Dismiss* (#28), *Declaration of Misty A. Murray*, ¶ 7.

9 On January 23, 2010, Defendant's counsel Martin Rosen sent an email to Plaintiff's counsel
10 Steven Parsons proposing that the parties stipulate to use depositions in this action that were taken
11 in related lawsuits. On January 27, 2010, Mr. Rosen sent a follow-up email to Mr. Parsons asking
12 him to respond to Mr. Rosen's prior email. Mr. Parsons responded that day with a positive reaction
13 to Defendant's proposal. Mr. Parsons stated, however, that his office was doing a comprehensive
14 review of all issues in Plaintiff's related cases and desired to complete that review and discuss it
15 with the Plaintiff before accepting Defendant's proposal. Mr. Parsons stated that this review
16 should be complete by mid-February 2010 and proposed a discovery "stand-down" until all of the
17 issues could be clarified. *Motion to Dismiss* (#28), Exhibit 5.

18 Mr. Rosen replied to Mr. Parsons' email nine days later on February 5, 2010. By that date,
19 the extension to provide discovery responses had expired. Mr. Rosen proposed that they discuss
20 the case by telephone the next week to see if they could agree on a process to summarily adjudicate
21 the total disability issue and to use depositions from the related cases. Mr. Rosen stated that
22 Plaintiff's discovery responses were now overdue. He offered to put off the discovery until after
23 Mr. Parsons discussed these matters with his client, but on the condition that Plaintiff thereafter
24 respond to the discovery requests without objections. *Motion to Dismiss* (#28), Exhibit 5. Mr.
25 Parsons and Mr. Rosen conducted a telephone conference on February 16, 2010. Mr. Rosen sent
26

27 ¹ The scheduling order set the discovery cut-off date as July 23, 2010. Expert witness
28 disclosures were due on May 28, 2010 and rebuttal expert disclosures were due on June 25, 2010.

1 Mr. Parsons a follow-up email that same day in which he stated that he forgot to raise the issue of
2 Plaintiff's discovery responses during the conference. He again noted that Plaintiff's discovery
3 responses were now overdue and requested that they be provided by February 23. *See Motion to*
4 *Dismiss* (#28), Exhibit 6.

5 On March 29, 2010, Defendant's counsel Misty A. Murray sent a follow-up email to Mr.
6 Parsons regarding Plaintiff's discovery responses. Ms. Murray stated that if the discovery
7 responses were not received by the end of the week, Defendant would seek court intervention.
8 *Motion to Dismiss* (#28), Exhibit 7. Mr. Parsons did not respond to this communication. Ms.
9 Murray telephoned Mr. Parson's office on or about March 31st to discuss the overdue responses and
10 was advised that he was not available. Ms. Murray left a message asking that Mr. Parsons return
11 her call, but he did not do so. *Motion to Dismiss* (#28), *Declaration of Misty A. Murray*, ¶ 10.

12 On April 7, 2010, Defendant filed its motion to compel Plaintiff to provide Rule 26(a)
13 disclosures and discovery responses. Plaintiff's response to the motion was due on April 26th. On
14 May 6th, Defendant filed a notice of non-opposition to the motion to compel. The Court thereupon
15 issued an order on May 7th granting Defendant's motion to compel and vacating the May 10, 2010
16 motion hearing. *Order* (#27). The order directed Plaintiff to serve his Rule 26(a) initial disclosures
17 and responses to Defendant's interrogatories and requests for production by May 28, 2010. *Id.* In
18 anticipation of receiving Plaintiff's initial disclosures and discovery responses, Defendant's counsel
19 noticed the deposition of Plaintiff for June 21, 2010. Plaintiff, however, did not provide
20 disclosures and discovery responses in compliance with the discovery order. *Motion to Dismiss*
21 *(#28), Declaration of Misty A. Murray*, ¶ 13.

22 On June 7, 2010, Ms. Murray informed Mr. Parsons that Defendant would be moving for
23 terminating sanctions due to the severe prejudice that Plaintiff's failure to respond to discovery and
24 to comply with the court's order was causing. *Id.*, ¶ 15. That afternoon, Mr. Parsons sent Ms.
25 Murray an email in which he apologized for the delay in providing discovery responses. He further
26 stated that he had been assured by his "on-staff person" well in advance of the May 28th deadline
27 that Plaintiff's discovery responses were nearly complete. Mr. Parsons stated, however, that he had
28 not seen any further productivity from his staff person "apparently due to his own medical

dilemmas.” *Motion to Dismiss* (#28), Exhibit 9.² Mr. Parsons also stated that he was suffering from a ruptured Achilles tendon, which had apparently been bothering him for several months, and which made it difficult for him to attend to this and other cases. *Id.* In response to Ms. Murray’s statement that Defendant would be moving for terminating sanctions, Mr. Parson’s further stated:

I sense that even in light of your client’s expressed desire to seek terminating sanctions, the entire debacle is without fault on my part, and I would be surprised if the Court is not favorably inclined to grant my client relief from the impending deadlines, if not relief for me. I note that in the hope that you and your client will work with me in seeking a stipulated continuance of the deadlines. This interim status note is for the purpose of that request.

Motion to Dismiss (#28), Exhibit 9.

Defendant’s counsel, Mr. Rosen, responded to Mr. Parsons’ email on June 7, 2010. *Motion to Dismiss* (#28), Exhibit 10. Mr. Rosen stated that Mr. Parsons had failed to respond to emails and phone calls requesting discovery responses before the motion to compel was filed, and had also failed to comply with the May 7th discovery order, or communicate with Defendant’s counsel about compliance until he was informed that Defendant would move for terminating sanctions. Mr. Rosen asserted that Defendant was “horribly prejudiced” by the delay.

On June 9, 2010, Defendant received Plaintiff’s responses to Defendant’s first set of interrogatories. *Motion to Dismiss* (#28), *Declaration of Misty A. Murray*, ¶ 17. On June 14, 2010, while Defendant was preparing its motion for sanctions, Plaintiff’s counsel emailed documents to Defendant’s counsel, but did not provide formal responses to the requests for production. Although Plaintiff’s counsel indicated that further documents would be forthcoming, Defendant states that no additional documents were provided before Defendant filed its motion to dismiss. *Id.*, ¶ 18. On June 21, 2010, Defendants counsel took Plaintiff’s deposition, but could not complete it because of the lack of complete discovery responses. *Id.*, ¶ 20.

The deadline for Plaintiff to respond to Defendant’s Motion to Dismiss (#28) was July 10, 2010. When Plaintiff did not file a timely written response, Defendant once again filed a notice of

² Plaintiff’s counsel advised the Court at the August 4th hearing that his legal assistant is suffering from cancer. Defendant’s counsel were apparently aware of the legal assistant’s illness prior to filing the motion to compel based on their dealings with him in other cases.

1 non-opposition on July 13, 2010. *See Docket Entry (#29)*. Plaintiff thereafter filed his opposition
2 on July 19, 2010--nine days late. *Opposition to Defendant's Motion to Dismiss (#30)*. The
3 opposition primarily focused on the arguments supporting Plaintiff's claims against Defendant.
4 Plaintiff argued that Defendant was seeking "to wrangle a windfall sanction because of Plaintiff's
5 unintended and excusable delays in finalizing discovery responses, which responses Plaintiff
6 believes are now complete." *Id.*, p. 3. Plaintiff further argued that Defendant's claims that it has
7 been "horribly prejudiced" by the delay was specious and self-serving at best, and that Defendant,
8 in fact, had suffered no prejudice. *Id.* Plaintiff's counsel briefly noted that the failures to provide
9 timely discovery responses or to respond to the motions was the result of excusable neglect arising
10 from his legal assistant's and his own medical problems as well as other extenuating factors. *Id.*,
11 p. 3, footnote 1. During the August 4th hearing, Plaintiff's counsel provided a lengthy explanation
12 of the numerous medical and other problems he and his office staff have experienced. Plaintiff's
13 counsel also repeated his argument that Defendant was not prejudiced by the discovery delay.

14 DISCUSSION

15 Rule 37(b)(2) of the Federal Rules of Civil Procedure authorizes the Court to impose a
16 variety of sanctions upon a party who fails to obey a discovery order or who fails to make the
17 disclosures required by Rule 26(a). Rule 37(c)(1) provides that a party who fails to timely make
18 disclosures required under Rule 26(a) is not allowed to use the information or witness to supply
19 evidence on a motion, at a hearing, or at trial unless the failure was substantially justified or is
20 harmless. The court may also impose other sanctions, including any of the orders listed in Rule
21 37(b)(2)(A)(i)-(vi). A prior discovery order is not required for sanctions under Rule 37(c).

22 Defendant requests that the Court dismiss Plaintiff's entire action because of his failure to
23 comply with the May 7th discovery order. Alternatively, Defendant requests that the Court preclude
24 Plaintiff from introducing any witnesses or documents that were not disclosed on or before May 28,
25 2010. This alternative sanction would be tantamount to dismissal since Plaintiff apparently did not
26 disclose any witnesses or documents by May 28, 2010. Defendant also requested that the Court
27 extend pretrial dates for 90 days for the benefit of the Defendant only. In addition, Defendant
28 requested an award of attorney's fees on the motion. In its Reply (#32), Defendant argued that the

1 court should, at minimum, dismiss the Plaintiff's "bad faith" claims as a sanction for Plaintiff's
2 failure to comply with the Court's order.

3 The Ninth Circuit has repeatedly stated that dismissal of a plaintiff's action as a sanction for
4 discovery violations is a very severe sanction and may only be imposed if the plaintiff's discovery
5 violations are willful, in bad faith or at fault. *Connecticut General Life Insurance Co. v. New*
6 *Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007), citing *Jorgensen v. Cassidy*, 320
7 F.3d 906, 912 (9th Cir. 2003). Disobedient conduct not shown to be outside the control of the
8 litigant is sufficient to demonstrate willfulness, bad faith or fault. *Jorgensen*, 320 F.3d at 912,
9 citing *Hyde & Drath v. Baker*, 24 F.3d 1162, 1166 (9th Cir. 1994). In *Connecticut General*, the
10 court discusses the additional factors that the district court should consider in deciding whether
11 terminating sanctions should be imposed:

12 " (1) the public's interest in expeditious resolution of litigation; (2) the
13 court's need to manage its dockets; (3) the risk of prejudice to the party
14 seeking sanctions; (4) the public policy favoring disposition of cases on their
15 merits; and (5) the availability of less drastic sanctions." The sub-parts of
16 the fifth factor are whether the court has considered lesser sanctions, whether
17 it tried them, and whether it warned the recalcitrant party about the
18 possibility of case-dispositive sanctions. This "test" is not mechanical. It
19 provides the district court with a way to think about what to do, not a set of
20 conditions precedent for sanctions or a script that the district court must
21 follow:

22 Like most elaborate multifactor tests, our test has not been
23 what it appears to be, a mechanical means of determining
24 what discovery sanction is just. The list of factors amounts to
25 a way for a district judge to think about what to do, not a
26 series of conditions precedent before the judge can do
27 anything, and not a script for making what the district judge
28 does appeal-proof.

22 *Connecticut General*, 482 F.3d at 1096, quoting *Valley Eng'rs v. Electric Eng'g Co.*, 158 F.3d
23 1051, 1057 (9th Cir.1998).

24 The court may consider all of the offending party's discovery conduct in deciding whether
25 the dismissal sanction is appropriate. *Henry v. Gill Industries*, 983 F.2d 943, 947 (9th Cir. 1993).
26 *Henry* further noted that the key factors are prejudice and the availability of lesser sanctions. *Id.*, at
27 948. The court rejected the argument that defendant suffered no prejudice because it eventually
28 received all the discovery it had sought. The court stated that "[a] defendant suffers prejudice if

1 the plaintiff's actions impair the defendant's ability to go to trial or threaten to interfere with the
 2 rightful decision of the case. (citation omitted.)" The court found that the lengthy delays caused by
 3 plaintiff's refusal to participate in discovery, which lasted more than a year, caused defendant to
 4 lose a key witness who became incapacitated and no longer available to testify. The Ninth Circuit
 5 has also has upheld imposition of severe sanctions where the sanctioned party has engaged in
 6 deliberately deceptive practices which undermine the integrity of the judicial proceedings, such as
 7 falsely asserting that relevant documents are no longer available. *Anheuser-Busch, Inc. v. Natural*
 8 *Beverage Distributors, Inc.*, 69 F.3d 337, 348 (9th Cir.1995). There is no evidence that Plaintiff or
 9 his counsel have engaged in the latter type of conduct.

10 The Ninth Circuit has stated that "it is not always necessary for the court to impose less
 11 serious sanctions first or give any explicit warning." *Valley Engineers Inc. v. Electric Engineering*
 12 *Company*, 158 F.3d at 1057, citing *Adriana International Corp. v. Thoeren*, 913 F.2d 1406, 1413
 13 (9th Cir.1990). The court further stated:

14 The significance of warning is that a sanction may be unfair if the
 15 sanctioned party could not have realized that it was in jeopardy of so
 16 severe a consequence if it was in error regarding its discovery
 17 posture. Rule 37 tells all lawyers and their clients that dismissal is
 possible if they violate discovery orders and direct warnings or other
 circumstances may make it clear that it is a real risk of continued
 violation in the particular case.

18 . . .

19 What is most critical for case-dispositive sanctions, regarding risk of
 20 prejudice and of less drastic sanctions, is whether the discovery
 violations "threaten to interfere with the rightful decision of the
 21 case." *Adriana*, 913 F.2d at 1412. While contumaciousness toward
 the court needs a remedy, something other than case-dispositive
 22 sanctions will often suffice. Dismissal is appropriate where a
 "pattern of deception and discovery abuse made it impossible" for the
 23 district court to conduct a trial "with any reasonable assurance that
 the truth would be available."

24 *Valley Engineers*, 158 F.3d at 1057-58, citing *Anheuser-Busch, Inc.*, 69 F.3d at 352.

25 At the August 4th hearing, the Court stated that it would recommend dismissal of Plaintiff's
 26 bad faith claims as an appropriate sanction for the discovery violations in this case. In preparing
 27 this order, the Court has more fully considered whether dismissal of Plaintiff's complaint, in or
 28 whole or in part, is a proper sanction in light of all the facts and circumstances, including the

1 availability of lesser sanctions.

2 The Court first addresses the issue of willfulness, bad faith or fault by Plaintiff. Defendant
3 argues that Plaintiff's discovery violations date back to December 2009 when he failed to make
4 disclosures as required Rule 26(a) and the scheduling order. Although Rule 26(a) requires a party
5 to disclose witnesses and documents it may use at trial without awaiting a discovery request, the
6 absence of a prior demand from the other party for overdue disclosures is relevant in determining
7 the extent of a party's willful or bad faith failure to comply with his discovery obligations. In this
8 case, Defendant did not make any explicit request or demand for Plaintiff's Rule 26(a) disclosures
9 until it filed the motion to compel.

10 Plaintiff was also not in willful default of his obligation to provide discovery responses
11 prior to February 23, 2010. Defendant granted Plaintiff an extension until January 29, 2010 in
12 which to serve his discovery responses. Between January 23 and February 16, 2010 the attorneys
13 exchanged emails and had at least one telephone conference regarding the streamlining of the case,
14 including using depositions taken in related cases. On January 27, 2010, Plaintiff's counsel
15 proposed a discovery "stand down." Defendant's counsel did not respond to this email until
16 February 5, 2010, a week after the discovery extension expired. Defendant's counsel agreed to the
17 "stand down" so long as Plaintiff thereafter provided discovery responses without objection.
18 Defendant's counsel sent a follow-up email after the parties' telephone conference on February
19 16th, requesting that Plaintiff's discovery responses be provided by February 23rd.

20 Plaintiff's counsel did not respond to the February 16th email or to Defendant counsel's
21 follow-up email on March 29th stating that Defendant would file a motion to compel if discovery
22 responses were not provided. Nor did Plaintiff's counsel respond to the March 31st telephone
23 message that Defendant's counsel left with his office. Plaintiff's counsel then failed to respond to
24 the motion to compel filed on April 7, 2010. Finally, Plaintiff failed to comply with the May 7,
25 2010 order requiring him to serve discovery disclosures and responses by May 28, 2010. Plaintiff's
26 counsel only began to comply with the order after he was informed by Defendant's counsel on June
27 7, 2010 that Defendant intended to move for terminating sanctions. These latter failures support a
28 finding of willfulness or bad faith. Some of the excuses offered by Plaintiff's counsel, in particular

1 the illness of his long time legal assistant, probably would have justified the granting of additional
2 time to respond to the discovery requests and for an extension of the discovery cut-off date and
3 other pretrial deadlines. Plaintiff's counsel, however, failed to notify Defendant's counsel or the
4 Court of these matters until June 7, 2010 when Defendant's counsel told him that she would be
5 filing a motion for sanctions.

6 Defendant cites *Tisdal v. Darkis*, 101 F.R.D. 307, 309 (D. Kan. 1984) and *Daye v. General*
7 *Motors Corp.*, 172 F.R.D. 173 (M.D.N.C. 1997) in support of its argument that Plaintiff's entire
8 lawsuit should be dismissed. The plaintiffs' attorneys in those cases failed to respond in any
9 manner to the motions to compel and motions for sanctions. Only after the courts ordered the
10 plaintiffs to show cause why the actions should not be dismissed, did the plaintiffs' attorneys offer
11 excuses for their failures to respond. The plaintiff's counsel in *Tisdale* stated that he was caring for
12 an ill child and was unable to keep up with his law practice. In dismissing the action, the court
13 noted that "[p]laintiff's counsel could have sought extensions of time or he could have asked
14 another member of his law firm to handle the case, or he could have withdrawn from the case.
15 However, plaintiff's counsel simply chose to do nothing" The attorney in *Daye* stated that he
16 was unable to respond to the discovery or the court's orders because of illness and because the
17 attorneys whom he hired to assist him terminated their relations with him. The court dismissed the
18 action because plaintiff's attorney failed to take any affirmative action to pursue the case.

19 Plaintiff's counsel's conduct in this case is not as egregious as that of the attorneys in
20 *Tisdale* or *Daye*. Plaintiff's counsel provided his client's answers to interrogatories and began
21 producing documents within a week after Defendant's counsel informed him that she would be
22 filing a motion for sanctions, but before the motion for sanctions was actually filed. Defendant has
23 also not pointed to the loss of any witness or other evidence caused by the discovery delay.
24 Additionally, Defendant's counsel indicated that as long as Defendant is provided with some
25 additional discovery time and the dispositive motions deadline is extended, it will not be prejudiced
26 in its ability to defend the declaratory relief and breach of contract claims. This Court has not
27 previously sanctioned Plaintiff or his counsel for discovery violations or explicitly warned them of
28

1 the possibility of terminating sanctions.³ Plaintiff's counsel, however, should clearly be aware that
2 severe sanctions may be imposed when he not only fails to provide discovery disclosures and
3 responses, but also ignores opposing counsel's communications, fails to respond to a motion to
4 compel and then fails to comply with the court's discovery order. Given the lack of evidence that
5 Defendant has been materially prejudiced in its ability to defend the contractual claims, however,
6 the Court concludes that the severe sanction of dismissing Plaintiff's entire action is not justified.

7 The delay in this case is prejudicial, however, to Defendant's ability to prepare a defense to
8 liability and, in particular, to damages on Plaintiff's bad faith claims. Plaintiff did not respond to
9 discovery or produce any documents relating to his bad faith claims until after the expert witness
10 disclosure deadline. Defendant had no opportunity to conduct other necessary discovery on these
11 claims during the discovery period. In addition, Plaintiff did not conduct any discovery of his own
12 and did not designate an expert witness on bad faith or any other issue before expiration of the
13 expert disclosure deadline on May 28, 2010. Even if Plaintiff's Opposition (#30) is construed as
14 request to extend discovery, it was filed nine days late and only four days before the end of
15 discovery. Local Rule LR 26-4 requires that motions to extend discovery or other pretrial
16 deadlines be filed no later than twenty (20) days before the expiration of the deadline. These facts
17 also do not justify reopening of discovery for the benefit of the Plaintiff to litigate his bad faith
18 claims pursuant to Local Rule (LR) 6-1(b).

19 CONCLUSION

20 The sanction of dismissing Plaintiff's bad faith claims is an appropriate and adequate
21 sanction for the delay and prejudice caused by Plaintiff's failure to provide discovery and comply
22 with the discovery order. Although belated, Plaintiff's counsel did begin to comply with the
23 discovery order before the filing of the motion for sanctions. Therefore, an award of attorney's
24 fees, in addition the dismissal of the bad faith claims, is not substantially justified. Should the
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26 ³ Attorney's fees were, however, awarded against Plaintiff in a related case for failure to
27 provide discovery responses. *Hake v. Unum Provident Corporation, Inc.*, 2008 WL 5069774 (D.
28 Nev.), Case No. 2:07-cv-00487-LDG-PAL, order dated November 20, 2008. As in this case,
Plaintiff's counsel asserted that the failure to timely respond was due to oversight by counsel.

1 dismissal of the bad faith claims be overruled, however, the Court recommends that Defendant be
 2 awarded its reasonable attorney's fees in the amount of \$2,528.50 incurred in filing the motion for
 3 sanctions.

4 Accordingly,

5 **RECOMMENDATION**

6 **IT IS HEREBY RECOMMENDED** that Defendant's Motion for Order Dismissing
 7 Action For Failure to Comply With Court's Discovery Order (#28) motion be **granted** as follows:

8 Plaintiff's Third Cause of Action for tortious breach of the duty of good faith and fair
 9 dealing and Fourth Cause of Action for violation of Nevada Revised Statute (NRS) §686A.310
 10 should be dismissed, with prejudice, as a sanction for Plaintiff's failure to provide discovery
 11 disclosures and to comply with the Court's order (#28). Defendant's request for dismissal of
 12 Plaintiff's entire action and for an additional award of attorney's fees should be **denied**.

13 **NOTICE**

14 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be
 15 in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has
 16 held that the courts of appeal may determine that an appeal has been waived due to the failure to
 17 file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit
 18 has also held that (1) failure to file objections within the specified time and (2) failure to properly
 19 address and brief the objectionable issues waives the right to appeal the District Court's order
 20 and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153,
 21 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

22 DATED this 1st day of September, 2010.

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 25 GEORGE FOLEY, JR.
 26 U.S. MAGISTRATE JUDGE
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